FOR ARGUMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SHARLENE WILSON

Petitioner,

vs.

THE STATE OF ARKANSAS

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT, THE STATE OF ARKANSAS

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792

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STATEMENT OF THE QUESTION

I.

EVEN IF ANNOUNCEMENT BY THE POLICE OF THEIR PRESENCE AND PURPOSE IS ORDINARILY A REQUIREMENT UNDER THE FOURTH AMENDMENT BEFORE THE POLICE MAY MAKE FORCIBLE ENTRY TO EXECUTE A SEARCH WARRANT, WAS THE CONSTITUTIONAL STANDARD OF REASONABLENESS MET IN THIS CASE; FURTHER, EVEN IF THE STANDARD WAS NOT MET, DOES THE FOURTH AMENDMENT REQUIRE THE EXCLUSION OF EVIDENCE OBTAINED UNDER A VALID SEARCH WARRANT, AND DURING A SEARCH OF PROPER SCOPE, BECAUSE OF A VIOLATION OF PRINCIPLES OF ANNOUNCEMENT?

INTEREST OF THE AMICUS

Amicus is the County of Wayne, Michigan, by the Wayne County Prosecutor's Office. The Office of the Wayne County Prosecuting Attorney is the largest in the State of Michigan, and the issue before this Court has arisen in Michigan, leading to conflicting views by panels of the State's Court of Appeals. Thousands of search warrants are executed annually in the State, the greater proportion of them involving searches for narcotics, and thus the issue before the Court is of great interest and importance to a large metropolitan area such as the Detroit area.

Counsel for amicus has appeared before the Court on four occasions, and the Wayne County Prosecutor's Office has appeared on nine occasions. Amicus has also filed as amicus previously before the Court, as well as before the Michigan Supreme Court. The issue before the Court is of great

practical importance, and amicus desires to present its perspective for the possible assistance of the Court.

STATEMENT OF THE CASE

Amicus concurs with the statement of the case of the State of Arkansas, as Respondent.

ARGUMENT

EVEN IF ANNOUNCEMENT BY THE POLICE OF THEIR PRESENCE AND PURPOSE IS ORDINARILY A REQUIREMENT UNDER THE FOURTH AMENDMENT BEFORE THE POLICE MAY MAKE FORCIBLE ENTRY TO EXECUTE A SEARCH WARRANT, THE CONSTITUTIONAL STANDARD OF REASONABLENESS WAS MET IN THIS CASE; FURTHER, EVEN IF THE STANDARD WAS NOT MET, THE FOURTH AMENDMENT DOES NOT REQUIRE THE EXCLUSION OF EVIDENCE OBTAINED UNDER A VALID SEARCH WARRANT, AND DURING A SEARCH OF PROPER SCOPE, BECAUSE OF A VIOLATION OF PRINCIPLES OF ANNOUNCEMENT.

A. An Analytical Model of the Fourth Amendment

Neither space nor time (nor a sense of the appropriate) permit a detailed analysis of an analytical model of the Fourth Amendment. To set the stage for the question of whether there is an interplay between the reasonableness clause of the Fourth Amendment and common law knock and announce requirements, however, amicus will very briefly describe the analytical model of the Fourth Amendment amicus believes

best comports both with the text of the amendment as well as its history.

(1) The Warrant Preference Approach

The unanswered question of the Fourth Amendment is, when, in order for a given search to be reasonable, a warrant is required. The Fourth Amendment itself does not say, or at least does not address the question specifically. This lack of specificity has led to two principal approaches: 1)the reasonableness clause dominates the Fourth Amendment, and there is no specific requirement that searches be pursuant to warrant, but rather there are requirements which must be met when a warrant is employed; and 2)the warrant clause dominates the Fourth Amendment; that is, a search is not reasonable unless a warrant is employed, unless certain specific exceptions to this rule are met.

Presently, the second theory dominates, as it has for many years.

However, as Justice Scalia has pointed out, this dominance is at least to some extent "illusory," because the "warrant requirement" has "become so riddled with exceptions that it (is) basically unrecognizable." California v Acevedo, 500 US __, 114 L Ed 2d 619, 636 (1991)(Justice Scalia concurring). There is, under the warrant dominance or warrant preference theory, which allows for numerous exceptions, no logically coherent explanation for when a warrant is required--the rule is simply that a warrant is always required, except when it is not.

The view that there is "nothing in the Fourth Amendment itself (requiring) that searches be conducted pursuant to warrants," the relevant test being, instead, "not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all circumstances;" or, put another way, the

view that "The Fourth Amendment contains two separate Clauses, each flatly prohibiting a category of governmental conduct....the ultimate question is whether the category of warrantless searches (in question) is 'unreasonable' within the meaning of the first clause," has plainly, then, not prevailed. See Robbins v California, 453 US 420, 69 L Ed 2d 744, 101 S Ct 2841 (1981) (Justice Rehnquist, dissenting); Coolidge v New Hampshire, 403 US 443, 29 L Ed 2d 564, 91 S Ct 2022 (1971) (Justice Black, concurring and dissenting); Marshall v Barlows, 436 US 307, 56 L Ed 2d 305, 98 S Ct 1816 (1978) (Justice Stevens, dissenting). But a "warrant preference/exceptions" theory of the Fourth Amendment fails to explain why some searches may be accomplished without warrant, and why some require a warrant, and is inadequate to do so.

(2) The Fourth Amendment Text and Seizure-Directed Searches

There is, however, a textual analysis of the Fourth Amendment which is, amicus submits, faithful to the Fourth Amendment text and as well as its history, and which goes far toward explaining when a warrant is required and when one is not. The answer is found in the warrant clause itself--in the probable cause and particularity requirements. See Bartee, "The Fourth Amendment: An Immodest Proposal," 11 Am J Crim Law 293, 298 (1983).

The Fourth Amendment provides that "no warrant shall issue, but **upon probable cause**, supported by Oath or affirmation, and **particularly describing** the place to be searched, and the persons or things **to be seized**." Within the warrant clause is the particularity clause. Toward what kinds or types of searches is the warrant clause aimed? Those which have as their principal

purpose the discovery and seizure of criminal evidence of one sort or another, for the items sought "to be seized" must be particularly described in advance to the magistrate. The logical inference drawable from the particularity clause, then, is that a warrant is required for searches the principal purpose of which is to discover and seize criminal evidence, or property to which the government has a superior claim to possession, unless necessity (exigent circumstances) justifies search without warrant, or unless no warrant was required at the common law. See California v Acevedo, 114 L Ed 2d at 636-637 (Justice Scalia concurring).

Not only does the particularity requirement in the warrant clause support a theory that a warrant is ordinarily required for searches which are principally seizure-directed (and not for those which

are not principally seizure-directed), with an exception for exigent circumstances, but so also does the requirement of probable cause; that is, there must be facts and circumstances that would lead a reasonably prudent person to believe that the items sought are in the place to be searched. The very concept of probable cause encompasses a search which is directed at an anticipated seizure of particular items.

History lends further support to the seizure-directed search approach to the warrant requirement. The Framers concern was with searches which were aimed at the discovery and seizure of things, searches which should require a specific warrant (and not a general warrant, or writ of assistance), as well as probable cause to believe the items will be found in the place to be searched. Indeed, as the dissents to Camara v Municipal Court, 387 US 523, 87 S Ct 1727, 18 L Ed 2d 930

(1967) and See v Seattle, 387 US 541, 18 L Ed 2d 943, 948, 87 S Ct 1737 (1967) and the opinion of the Court in the repudiated Frank v Maryland, 359 US 360, 3 L Ed 2d 877, 79 S Ct 804 (1959) make clear, nonseizure-directed warrantless searches, such as regulatory inspections, have their antecedents deep in our colonial history. At the same time that colonists railed against the general warrant, and at the beginning of the Nation under the Fourth Amendment adopted to cure the abuse of the general warrant, regulatory searches without warrant not only were allowed but greatly expanded--these searches were not "seizure-directed," not anticipating, with probable cause, the discovery and seizure of any items.

(3) The Reasonableness Clause and Searches Pursuant to Warrant

This is not to say that searches which are not seizure-directed fall outside the

Fourth Amendment, but that they fall outside the warrant clause (for example, inventory searches, searches incident arrest, and other searches which do not require probable cause to anticipate the discovery and seizure of items because their principal purpose is not to discover evidence of criminality). These searches still fall within the reasonableness clause of the Fourth Amendment, and the concerns of the Court in Camara and See regarding the possible unreasonable execution of inspection searches could be obviated without imposing a warrant requirement which the text simply will not brook. Indeed, as Justice Stevens has pointed out, there are circumstances where a warrant may supply less protection for an inspection search than ought to be required by the reasonableness clause of the Fourth Amendment. See e.g. Michigan v Clifford, 464 US 287, 78 L Ed 2d 477, 104 S Ct 641

(1984) (Justice Stevens, concurring). See also Wyman v James, 400 US 309, 27 L Ed 2d 408, 91 S Ct 381 (1971).

Searches which are seizure-directed, and which are neither undertaken under exigent circumstances, nor under circumstances where no warrant was required at the common law, do, then require a warrant in order to be reasonable by the terms of the warrant clause itself. This does not, however, end the constitutional inquiry--it does not mean that because, in order to be reasonable, a warrant is required in these circumstances, any search undertaken pursuant to a proper warrant is itself permissible, for even that search is subject itself to the reasonableness clause of the Fourth Amendment, which applies to all searches, both unwarranted and warranted.

A search undertaken pursuant to warrant, then, must be reasonable in two senses. First, there is a sort of reasonableness internal to the warrant clause itself, and that is the question of scope and intensity; did the search undertaken exceed that appropriate to discover items for which the warrant authorized a search? Second, even as to searches within the proper scope authorized by the warrant, by application of the reasonableness clause these searches themselves must be reasonably executed. This brings us (perhaps at last!) to the issue at hand: does application of the reasonableness clause to the execution of warranted searches lead to the conclusion that before a forcible entry may be made to search premises there must be an announcement by the police of their presence and purpose, unless lack of an announcement is justified under one of

several exceptions (principally, justifiable fear of loss of the evidence; justifiable fear of harm; or justifiable belief that to announce is, under the circumstances, an empty gesture)? That inquiry must begin with the common law.

B. The Common Law, And Fourth Amendment "Reasonableness"

Before examining the common law with respect to the issue of "knock and announce" before a search warrant is executed, it is first necessary, amicus believes, to decide whether the common law on the point makes any difference with regard to interpretation of the Fourth Amendment and the requirement that all searches be reasonable. Amicus submits that the common law is of utmost importance to the question, as demonstrated by cases from the Court.

That common law traditions inform judgments regarding the meaning of the

Fourth Amendment is beyond question, and therefore the point will not long be labored here. A mere sampling of cases from this Court makes the point. In Gerstein v Pugh, 420 US 103, 43 L Ed 2d 54, 95 S Ct 854 (1975), for example, the Court held that the Fourth Amendment "requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest," the Court grounding its decision in large part on the fact that its result had "historical support in the common law that has guided interpretation of the Fourth Amendment" (43 L Ed 2d at 64, emphasis supplied).

The Court looked to common law principles for guidance in United States v Watson, 423 US 411, 46 L Ed 2d 598, 96 S Ct 820 (1976) in determining that no arrest warrant is needed for an arrest in a public place. Canvassing authorities such as

Blackstone, Hale, and English cases, the Court observed that "The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest," 46 L Ed 2d at 606-607, noting further that "The balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact." 46 L Ed 2d at 608. See also the concurring opinion of Justice Powell, 46 L Ed 2d at 612-613.

In Payton v New York, 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371 (1980) the Court considered whether warrantless entries into the dwelling to achieve arrests based on probable cause are permissible. Though

concluding not, both the majority and the dissent looked heavily to the common law, the majority concluding that the authorities regarding the common law rule revealed a deep divergence of opinion among scholars, and very few judicial opinions. The majority thus concluded that its study of the relevant common law simply did not provide sufficient guidance to inform the decision, 63 L Ed 2d at 658, the dissent taking issue with the majority on its understanding of the common law on the question, and being of the view that the "Fourth Amendment was directed towards safeguarding the rights at common law...." 63 L Ed 2d at 665. Similarly, in Steagald v United States, 451 US 204, 68 L Ed 2d38, 101 S Ct 1642 (1981) the majority of the Court declined to use the common law as a guide to decision of the question whether entry into the home of a third party to arrest a nonresident can be accomplished

without a search warrant because "the common law...sheds relatively little light on the narrow question before us...." 68 L Ed 2d at 50.

The Court turned to the common law in Oliver v United States, 466 US 170, 80 L Ed 2d 214, 104 S Ct 1735 (1984) as an aid to determining whether the term "houses" in the description of the Fourth Amendment as to that which is protected from unreasonable searches and seizures ("persons, houses, papers, and effects") includes open fields, or is limited to the curtilage of the dwelling. See 80 L Ed 2d at 225, the Court finding that, as Justice Holmes had said, the difference between the curtilage and the open field is as "old as the common law." See also California v Ciraolo, 476 US 207, 90 L Ed 2d 210, 106 S Ct 1809 (1986); Dow Chemical v United States, 476 US 227, 90 L Ed 2d 226, 106 S

Ct 1819 (1986); United States v Dunn, 480 US 294, 94 L Ed 2d 326, 107 S Ct 1134 (1987).

Finally, the question in California v Hodari D., 499 US 621, 113 L Ed 2d 690, 111 S Ct 1547 (1991) was whether an individual in full flight can be considered "seized" under the Fourth Amendment because of the objective manifestation of the police of a desire to seize him. The Court looked to the common law to reject this rather extravagant claim of meaning of the word "seizure." See 113 L Ed 2d at 696-697.

The foregoing is but a sampling of the many cases in which the Court has turned to the common law as an aid to determining that which is encompassed within the protections provided by the Fourth Amendment. Plainly it can at least be said that practices at common law are highly relevant to understanding the protections

supplied by the text of the Fourth Amendment. More particularly, then, they are relevant to the question of whether the reasonableness clause requires that warranted searches of premises be preceded by an announcement from the police of their presence and purpose, and, if so, what the contours of that requirement are, as well as the scope of any exceptions to it.

C. There Was A Common Law Requirement of Announcement of Presence and Purpose Before Forcible Entry to Execute A Warrant, Which Informs the Reasonableness Clause

(1) The Common Law Requirement

The opinions of both the Arkansas Supreme Court in this case, and of the Michigan Court of Appeals in People v Polidori, 190 Mich 673 (1991), followed by operation of the Michigan conflict resolution rule in People v Asher, 203 Mich App 621 (1994) (the panel indicating it otherwise would have reached a different

result), and reaching opposite conclusions, are unfortunate in the brevity of their analyses. The opinion of the Arkansas Supreme Court in Wilson v State, 878 SW2d 755 (Ark, 1994), in response to the argument of the defendant that the entry of the officers violated the Fourth Amendment because the officers did not announce their presence and purpose prior to entering the residence to execute the search warrant, states only that "There is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment." 878 SW2d at 758. The opinion of the Michigan Court of Appeals in Polidori, reaching the opposite result, says only that "we agree with a number of other jurisdictions that the requirement that officers identity themselves and state their authority and purpose before entering a private residence has its roots in the Fourth Amendment." 190 Mich App at 676.

There is, of course, authority on the question, authority not unfamiliar to this Court.

Amicus will not equivocate on the point: common law practices, and early English decisions, do reveal a requirement of announcement of presence and purpose on the part of government authorities before making forcible entry into private premises, a requirement which, then, informs our understanding of the reasonableness clause of the Fourth Amendment (and ought also to inform our understanding of the exclusionary rule, none of the cases establishing the knock and announce principle being a criminal case requiring the exclusion of evidence seized in "violation" of knock and announce principles). Though most of the early sources concern entry to arrest rather than to search, it seems clear that the same principles should govern both sorts of

entry.

Again, the early authority regarding the question is not unknown to the Court. The most oft-cited case is Semayne's Case, 77 Eng Rep 194, 195 (1603), where it was said that "in all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors...." American courts quickly began to make the same point. See Bell v Clapp, 10 Johns.R. 263 (NY Sup Ct 1813); see generally Blakey, The Rule of Announcement and Unlawful Entry: Miller v United States and Ker v California, 112 Pa L Rev 499 (1964). This Court, though it has never held that the Fourth Amendment reasonableness clause requires announcement of presence and

purpose in ordinary circumstances before forcible entry may be made to execute a search warrant, has itself discussed the common law requirement, recognizing that at the common law announcement of presence and purpose was required in ordinary circumstances. See Miller v United States, 357 US 301, 2 L Ed 2d 1332, 78 S Ct 1190 1958); and Ker v California, 374 US 23, 10 L Ed 2d 726, 83 S Ct 1623 (1963) (where it appears that four members of the Court would have found the announcement of presence and purpose requirement in the reasonableness clause).

If, then, the common law practices inform our understanding of the Fourth Amendment, and if at the common law announcement of presence and purpose was ordinarily required before forcible entry to execute a warrant could be justified, then amicus believes that announcement of

presence and purpose is required, in ordinary circumstances, by the reasonableness clause of the Fourth Amendment. However, the rule is not without exceptions: there are circumstances where a forcible entry to execute a warrant is permissible absent announcement of presence and purpose, as the common law itself recognized.

(2) The Exceptions To The Common Law Rule

That the reasonableness clause does not require that police executing a search warrant knock and announce their presence and purpose in some circumstances is universally accepted, and without controversy. Essentially, announcement of presence and purpose before forcible entry may be undertaken is not required when, considering the purpose of the warrant, it would in fact be unreasonable to require the police to do so. The purpose of the

search warrant is to allow the police to search for and to seize items named in the warrant, and, of course, to do so in safety. See Michigan v Summers, 452 US 692, 69 L Ed 2d 340, 101 S Ct 2587 (1981). Announcement of presence and purpose assures that forcible entry will not result in destruction of property, and possibly cause violence itself, unless peaceful entry is directly or indirectly refused. Where announcement of presence and purpose, then, will lead either to frustration of the warrant through destruction or concealment of the items sought, or is dangerous to the officers executing the warrant, or is a "useless gesture" because it is clear from the facts surrounding the executing of the warrant that those present were aware that the police were present and of their purpose, the reasonableness clause does not require the announcement of presence and purpose as a prerequisite to

forcible entry. Again, these principles are universally accepted and long established. See generally 2 LaFave, Search and Seizure, sec. 4.8(d), (e), and (f).

D. Reasonableness and Knock and Announce in the 20th and 21st Centuries

Amicus is firmly of the belief that the Constitution does not "change with the times," with those changes being made by judges; rather, if the People so desire, the Constitution may be changed through the amendment process, as it has been on many occasions, and as the Constitution itself plainly contemplates. Certainly the concepts or principles expressed in the Constitution may be applied to circumstances not envisioned by the Framers, but the concepts themselves--the Constitution itself--remains constant.

A thorough examination of the appropriate method of constitutional interpretation cannot be undertaken here, but amicus would pause a moment to point to several statements by giants of Michigan jurisprudence on the point--giants in jurisprudence at the time of their service, and giants in our nation's history. Justice Thomas Cooley, in his celebrated work Constitutional Limitations (1868; Legal Classics Library Edition, 1987), stated that "The object of construction, as applied to a written constitution, is to give effect to the intent of the people in adopting it." Cooley, at 55 (emphasis in the original). This method of construction is a part of our jurisprudential history. The court is to "declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is

adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." Cooley, at 55.

Another giant of Michigan jurisprudence, and contemporary of Justice Cooley on the Michigan Supreme Court, Justice Campbell, put it this way in People v Blodgett, 13 Mich 127, 138 (1865): "The meaning of our constitution was fixed when it was adopted, and the question which is now before us is not different from what it would have been had the constitution been recently adopted....Constitutions cannot be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of government, until they are amended or abrogated by the action prescribed by the authority which created them."

This does not, however, mean that the constitution is "static" in that it cannot

be applied to unforeseen events or developments (such as modern technology) --surely, its principles can be applied to new or changed circumstances, as Justice Campbell himself recognized over 125 years ago: "That the constitution means nothing now that it did not mean when it was adopted, I regard as true beyond doubt. But it must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances." Blodgett, at 140 (emphasis added). The principles do not change--the constitution does not change to meet the times--the constitution is simply capable of application to new or different circumstances.

Assuming that at the common law there was a requirement of announcement of presence and purpose before a forcible entry to execute a warrant could be made, and assuming that the reasonableness clause

of the Fourth Amendment is informed by common law practices, it is also true that there are exceptions to the knock and announce requirement. How is the requirement itself to be viewed, and what is the scope of its exceptions, in a modern world?

In Minnesota v Dickerson, __US__, 124 L Ed 2d 334 (1993), Justice Scalia, while concurring with the majority, expressed concern regarding the "frisk" component of Terry v Ohio, 392 1, 20 L Ed 2d 889, 88 S Ct 1868 (1968). Justice Scalia agreed that the "stop" portion of Terry comports with common law practices, see 124 L Ed 2d at 349, but could find no common law precedent for any physical search incident to that stop. 124 L Ed 2d at 349. In remarks consistent with the views of Justices Cooley and Campbell quoted previously, Justice Scalia explained that common law practices are important to the

constitutional inquiry because, in his view, a view with which amicus agrees, it is a "fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification." 124 L Ed 2d at 348. However, just as Justice Campbell further cautioned that it is also true that the Constitution "must be regarded as meant to apply to the present state of things as well as to all other past or future circumstances," Justice Scalia agreed that even if a frisk prior to arrest would have been impermissible in 1791, or in 1868 when the Fourteenth Amendment was adopted, it might well be that "it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common--which might alter the judgment of what is 'reasonable' under the original

standard." 124 L Ed 2d at 350. Similarly, the question here is the application or scope of the reasonableness standard, which is informed by common law practices--a requirement of announcement of presence and purpose before forcible entry to execute a search warrant, with exceptions to the requirement when there is sound reason to believe announcement will frustrate the purpose of the warrant, will lead to harm of the executing officers, or is an "empty gesture" because it is clear from the circumstances that those inside are already quite aware of the presence and purpose of the police--in a modern world which is, in terms of possible harm to officers executing warrants and possible frustration of warrants through destruction of evidence (especially in drug cases), quite different from the world of 1791 and that of 1868.

Amicus would point to one other case demonstrating that common law principles

may be applied somewhat differently to a changed world. In Tennessee v Garner, 471 US 1, 85 L Ed 2d 1, 105 S Ct 1694 (1985) this Court considered the degree of force permissible under the reasonableness clause in order to effectuate the arrest of a fleeing felon. Justice White, writing for the Court, recognized that at the common law whatever force was necessary to effect the arrest of a fleeing felon was permissible, including deadly force, without regard to whether the felony which had been committed was a violent one, and without regard to any standard of cause as to whether the fleeing felon was armed, citing to Hale and Blackstone. While agreeing that this Court has "often looked to the common law in evaluating reasonableness, for Fourth Amendment purposes," Justice White also expressed the view that common law practices do not necessarily govern where there has been a

"sweeping change in the legal and technological context...." 85 L Ed 2d at 11.

Justice White turned then to the "sweeping change in the legal and technological context," noting, among other things, that the common law rule arose at a time when virtually all felonies, including nonviolent felonies, were punishable by death, and at a time when many offenses now classified as felonies were either misdemeanors or did not exist. Further, technology with regard to weaponry has changed from the time of the common law rule, where deadly force "could be inflicted almost solely in a hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk." 85 L Ed 2d at 12. Because, then, the premises underlying the common law rule simply no longer exist, the common law rule could not, held the Court, supply the

reasonableness test under the Fourth Amendment, at least not entirely.

Caution and restraint, however, must be exercised when, in construing reasonableness under the Fourth Amendment, the Court departs from common law practices, for the Court is then open to the charge of legislating, and to illegitimacy. Indeed, amicus would contend that Garner itself pushes the outer edges of appropriate judicial construction of the Constitution. The issue of the relationship between the reasonableness clause and announcement of presence and purpose before a warrant is executed in light of modern developments both in terms of weaponry, and therefore danger to the officers executing the warrant, and the ready disposability of contraband, and consequently the frustration of the warrant, however, does not require the sort of abrogation of a common law principle as

in Garner, but simply the recognition that the purposes underlying the understood exceptions to the "knock and announce" requirements extend to situations today not envisioned at the common law, so that the "knock and announce" requirement may be dispensed with in certain classes of searches on a blanket basis, consistent with the reasonableness clause.

The question becomes whether announcement of presence and purpose may be excused on the ground of a reasonable fear of destruction of the items sought through the warrant and a reasonable fear of injury to executing officers if presence and purpose are announced in certain classes of cases, or can only be determined on an individual case-by-case basis. Consistent with the remarks of Justice Scalia concurring in Minnesota v Dickerson, amicus would point out that it is quite clear that circumstances have changed since 1791, and

since 1868 when the Fourteenth Amendment was adopted, changes "which might alter the judgment of what is 'reasonable' under the original standard." Indeed, the position of amicus is in fact more limited--it is not that the standard of reasonableness has altered, it is that reasonableness may be <u>demonstrated</u> in an unannounced forcible entry to execute a search warrant for the same reasons it has always been deemed reasonable, but that showing may, in light of modern circumstances, now be made in certain classes or categories of cases.

The recent case of <u>State</u> v <u>Stevens</u>, 511 NW2d 591 (Wis, 1994) demonstrates the acceptance of a categorical finding of reasonableness by a State Supreme Court. Though the Wisconsin Supreme Court noted, and correctly, that this Court has yet to decide the question of whether the Fourth Amendment reasonableness clause requires, in ordinary circumstances, that the police

knock and announce before forcible entry is made to execute a search warrant, the court considered a categorical exception to its own common law knock and announce rule.

Announcement of presence and purpose serves, said the court, to protect officers and others by warning the occupants of the officers' impending entrance; it protects the occupants limited privacy interests where the police have judicial authorization to enter and search; and it helps prevent the physical destruction of property. Where these interests would not be served, or would be counterproductive to safety and lead to frustration of the warrant, it is not reasonable to require that the police knock and announce. 511 NW2d at 595. Can it be said, in a class of cases, that it is reasonable for the police to believe that knocking and announcing will lead to frustration of the warrant and

danger to themselves? The Wisconsin Supreme Court answered in the affirmative.

The specific holding of the court was that "when the police have a search warrant, supported by probable cause, to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs 'evidence of drug dealing', they necessarily have reasonable cause to believe exigent circumstances exist. Thus, in all such searches the police are justified in dispensing with the rule of announcement and making a no-knock entry." 511 NW2d at 595 (emphasis added).

In a modern world it is clear, said the court, that the object of the search warrant in drug cases is easily capable of destruction: "Several jurisdictions have acknowledged that most drugs are easily disposed of using standard plumbing." 511 NW2d at 595. The court observed that "At least six other courts have adopted such a

'blanket' exception to the rule of announcement." 511 NW2d at 596 (citations omitted). See also United States v Moore, 956 F2d 843, 850 (CA 8, 1992): "It is reasonable for police officers to assume that suspects selling illegal drugs in small quantities from a residence that has normal plumbing facilities will attempt to destroy those drugs if officers knock before a search warrant is executed."

Moreover, with regard to the dangers of unannounced entry, the court found that the assumption that unannounced entry might lead to violence as opposed to announced entry which would not is "no longer valid in today's drug culture. In fact, by announcing their presence, police may actually increase the likelihood for violence. 'The law has 'uniformly...recognized that substantial dealers in narcotics possess firearms and that such weapons are as much tools of the

trade as more commonly recognized drug paraphernalia.'" 511 NW2d at 596. See also Bureau of Justice Statistics, A National Report: Drugs, Crime, and the Justice System, at 5 (Dec, 1992): "To avoid being arrested and punished for trafficking, drug dealers commit violence crimes against police...."

The historical notion that following the rule of announcement is more likely to prevent violence the court simply found untrue in the context of drug searches, where "Police departments and commentators have determined that the police can decrease the possibility for violence during a search by taking control of the situation quickly." 511 NW2d at 597. The court thus found that the purpose of knock and announcement of avoiding injury to the executing officers and to occupants of the building is in fact disserved in certain drug cases.

In neither 1791 nor 1868 did today's drug problem exist, where thousands of search warrants are executed with regard to a class of contraband which is readily disposable, with the means of disposal, modern plumbing, readily reachable after the police knock and announce that they are there to search for and seize this very contraband. Nor did modern weaponry exist at these times. It has always been permissible under the reasonableness clause to make forcible entry to execute a warrant without knocking and announcing when the purposes served by knocking and announcing would not be served by so doing. Amicus simply submits that today it is demonstrably true that as to certain classes of cases those purposes are not only not served, but are disserved by knocking and announcing. It is permissible, then, under our Federal system for a state to choose to allow forcible

entry without knocking and announcing in these classes of cases, as the Constitution will not be violated by this method of search warrant execution. Should a state choose to reach another conclusion under its own constitution, common law, or statutory law, that is its choice, and a part of our Federalism. But the Fourth Amendment reasonableness clause allows the choice where the purposes of knocking and announcing are not served, and allows the States to make that determination on a categorical or "class" basis.

E. Application Of A Rule of Exclusion of Evidence To Knock and Announce Violations

Amicus would submit that even if it is found in a particular case that, whatever the scope of the requirement of announcement of presence and purpose, that requirement has been violated, there remains the critical question of whether

exclusion of evidence as a consequence is appropriate, and amicus submits that it is not, and would note that none of the early English cases concerning the announcement requirement are criminal cases excluding evidence, but instead are civil suits for damages.

Assume several examples: 1)the police enter a home and search it with no warrant at all, and no exigent circumstances or any other independent justification; 2)the police enter a home and search with a search warrant in areas within the home where the items sought could not possibly be found, finding other seizable items instead, and 3)the police enter a home and search it pursuant to a search warrant, finding the items sought in a search of proper scope and intensity, but after having failed to wait after knocking on the door and announcing their presence and purpose for a time sufficient to allow a

person in the room furthest from the door to answer. In the first two situations the invasion of privacy simply should not have occurred at all. In the first, the entry into the dwelling should never have occurred; in the second, the search of certain places within the dwelling should never have occurred. The evidence should never have been discovered, privacy should never have been violated, and exclusion is the result. But in the third situation, with a valid search warrant, and a search of proper scope, but a "timing" error with regard to entry, was the invasion of privacy--the entry into the home and the search--proper? Surely it **was**--the police had a right under law to make it. Was the seizure of property appropriate? Surely it **was**--the police had a right under law to seize it. Does employing the **same** "sanction" where the police had every right to search and seize, but entered too

quickly, as when the police had no right to invade premises and seize property at all make any sense? Surely **not**--in two privacy has been improperly invaded; in the latter, the knock and announce "failure," it has been validly invaded. Only if knocking and announcing has as a purpose that those inside should be given a fair opportunity either to destroy the evidence sought or to injure the officers executing the warrant does exclusion of the evidence in this situation make sense. These violations are simply different in kind, and, most respectfully, amicus submits that it is myopic to treat them as though they were no different at all. As Chief Justice Warren noted, in a slightly different context:

> "The exclusionary rule has its limitations as a tool of judicial control....[In] some contexts the rule is ineffective as a deterrent....Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of

> these limitations....[A] rigid and unthinking application of the...rule...may exact a high toll in human injury and frustration of efforts to prevent crime." Terry v Ohio, 392 US 1, 13-15; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Exclusion of evidence where there has been a valid invasion of privacy, and a proper discovery and seizure of evidence, then, is not, amicus submits, an appropriate sanction for police "error" with regard to announcement of presence and purpose.

CONCLUSION

WHEREFORE, amicus requests that this Honorable Court affirm the judgment of the Arkansas Supreme Court.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals